

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

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GLORIA SCOTT AND *
DEANIA JACKSON, *
* NO. 96-8461
VERSUS * DIVISION "I"
* SECTION 14
*
THE AMERICAN TOBACCO *
COMPANY, INC., ET AL. *

Transcript of proceedings before the
Honorable Richard J. Ganucheau, Judge Pro Tempore,
Civil District Court, Parish of Orleans, State of
Louisiana, 421 Loyola Avenue, New Orleans, Louisiana
70112, commencing on June 18, 2001.

* * * * *
Tuesday Morning Session
April 8, 2003
9:50 a.m.
* * * * *

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18093

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18096

1 Tuesday Morning Session

2 April 8, 2003

3 9:50 a.m.

4 * * * * *

5 P R O C E E D I N G S

6 * * * * *

7 (In open court with a jury present:)

8 THE COURT:

9 Good morning. You are still under
10 oath, Doctor.

11 THE WITNESS:

12 Yes, sir.

13 THE COURT:

14 Mr. Long, are you ready to continue
15 with the testimony of this witness?

16 MR. LONG:

17 Yes, Your Honor.

18 THE COURT:

19 Proceed.

20 MR. LONG:

21 Good Morning, ladies and gentlemen.

22 -- -- --

23 SAMUEL V. SPAGNOLO, M.D.

24 being previously duly sworn by the Clerk, testifies

25 and says further as follows:

26 -- -- --

27 DIRECT EXAMINATION (Continued)

28 BY MR. LONG:

29 Q. Good Morning, Dr. Spagnolo.

30 A. Good Morning.

31 Q. Dr. Spagnolo, I want to start talking to you
32 about cancer staging. Could you tell the jury what

18097

1 cancer staging is?

2 A. Well, in order to treat patients who have

3 cancer, you have to determine where it is. And we
4 call that staging.
5 So what we do is we look to -- in other areas
6 to see if the cancer has gone from one place to
7 another place. And that's called staging.
8 That's kind of an overview.
9 And the way we do that is that we will do a
10 variety of other tests to determine if we can find
11 any evidence for the cancer in another part of the
12 body. And so -- and we give, depending upon where
13 that might be, we call it a stage.
14 And in cancer, we generally use Stage 1
15 through Stage 4.
16 MR. LONG:
17 Before I go any further, Your Honor,
18 could we throw the beads to the jurors?
19 Because we are going to need those to
20 explain some tumor sizes.
21 THE COURT:
22 Yes. Mr. McCoy, do you have the
23 beads?
24 MR. LONG:
25 Everybody got their beads?
26 BY MR. LONG:
27 Q. Okay. Doctor, you were saying that when you
28 stage cancer, it's Stage 1 through 4?
29 A. That's the usual staging.
30 Q. And a Stage 1, is that considered the
31 earliest or most treatable stage of cancer?
32 A. Yes.

18098

1 Q. And Stage 4, would that be considered the
2 latest and probably less treatable, less curable
3 stage of cancer?
4 A. Yes.
5 Q. So the higher the number, the later the stage
6 of cancer?
7 A. Yes.
8 Q. And does tumor size itself determine the
9 stage of a cancer?
10 A. Not by itself.
11 Q. I mean, I take it if a tumor is over a
12 certain size, it may have some impact on the
13 staging, am I correct, if it's over three
14 centimeters?
15 A. That would put it into a different stage.
16 Q. Okay. But if it's under -- is it correct to
17 say that any tumor under three centimeters can turn
18 out to be anything from a Stage 1 to a Stage 4?
19 A. It could be, depending upon where else we
20 might find the tumor.
21 Q. Okay. And could you -- on the beads there,
22 could you indicate to the jurors which of those
23 beads are all under three centimeters?
24 A. Well, they are all under three centimeters.
25 All of these little beads that we showed
26 yesterday are all under three centimeters. So we
27 would -- in the staging classification, I didn't
28 really want to get too complicated, but we talk
29 about the tumor, this part, and then we talk
30 about -- so that's a T for tumor.
31 And then we talk about N for lymph nodes, the
32 swollen glands we may find somewhere.

1 And then we talk about M, which means
2 metastasis or spread in other parts of their body
3 outside of the chest.

4 But these are all under three centimeters or
5 30 millimeters. So these are all what we would call
6 T1 lesions.

7 Q. So you could take -- if you saw a lesion of
8 any of those sizes, from the smallest to the biggest
9 on a CT scan, and let's say you put a needle biopsy
10 in and it turned out to be lung cancer, if that's
11 all you knew, could that tumor regardless of its
12 size still be anything from a 1, Stage 1 to a Stage
13 4?

14 A. Yes. Just finding out that this is a tumor
15 just tells you that it's a tumor and that it's under
16 three centimeters, but it doesn't tell you the
17 stage.

18 So it could be, if you found this, you could
19 have a T -- you could have a Stage 1 or a Stage 4.

20 Q. Now, are there two types of staging, clinical
21 staging and pathological staging?

22 A. Yes, there are two. There are two types,
23 and --

24 Q. Would you explain the difference to the
25 ladies and gentlemen of the jury, please?

26 A. Clinical staging is the clinician, like me,
27 who would examine the individual and look at the
28 tests and look at the x-rays, some of which we
29 talked about yesterday, and after doing all of that
30 say I think the patient is in Stage 1 or Stage 2 or
31 Stage 3 or Stage 4, without necessarily having any
32 particular tissue. Maybe we just had the biopsy

1 from one of these nodules, period. So we knew it
2 was cancer. Then I looked at all of the other data,
3 and I said it looks like it's a Stage 3 or a Stage
4 4.

5 The opposite, which is called pathologic
6 staging, is when not only might I have this tumor
7 biopsy, but perhaps I biopsy the liver because there
8 was an abnormality there, and there was the cancer
9 in the liver. Or I biopsied a swollen lymph node
10 somewhere in the middle of the chest.

11 So that then means I have pathologic
12 staging. I know exactly where the tumor is based on
13 actually seeing the tumor somewhere else as opposed
14 to "I think the stage is."

15 So I have a clinical judgment and then I have
16 pathologic staging. So they are a little bit
17 different.

18 And the pathologic staging is usually when we
19 look at a big series of studies, it's usually a
20 little more accurate.

21 Q. As a clinician, you do treat people with lung
22 cancer; right?

23 A. Yes.

24 Q. And your treatment decisions, are they
25 normally based on clinical staging or pathological
26 staging?

27 A. Well, we like to base our treatment decisions
28 on -- we like to base both actually on pathologic
29 staging.

30 There are rare exceptions when perhaps the
31 individual is so ill that we may not proceed with a
32 pathologic staging. As I mentioned yesterday,

18101

1 operability, there may be some people who are so
2 sick from other problems that we may not do
3 pathologic staging.

4 But in most we prefer to do pathologic
5 staging because it's more precise.

6 Q. Let's take a hypothetical case of staging.

7 Let's say you have a CT scan done on a
8 patient, and the CT scan shows this solitary
9 pulmonary nodule that we talked about yesterday;
10 okay?

11 And on the CT scan, it looks to be about 1.2
12 centimeters in diameter.

13 Can you show the jury which of those beads is
14 closest to 1.2 centimeters in diameter, please?

15 A. Let's see. The third from the biggest would
16 probably be closest to the 1.2. This is probably a
17 little tiny bit more -- this is probably 1.3 or
18 1.4. So maybe two millimeters.

19 So about twelve millimeters. About this size
20 here.

21 Q. Okay. And let's say -- and that would be
22 large enough to stick a needle biopsy into; correct?

23 A. This size, yeah, this would be pretty good.
24 The yield would be pretty good.

25 Q. Let's say you stick a needle in, get the
26 tissue, look at it, it's lung cancer. Is that
27 enough to stage the disease?

28 A. No. That's what I was trying to say before.

29 Q. Okay. Let's say in the same patient it turns
30 out that there is another tumor in the lung, and
31 that tumor turns out to be let's say one centimeter,
32 and that tumor turns out to be lung cancer.

18102

1 Could you show the jury which of those beads
2 most closely approximates one centimeter?

3 A. Well, it's basically the same one we just
4 talked about. It would be the third -- the third
5 from the biggest, or it would certainly be bigger
6 than the one here that's about eight millimeters.

7 So it's a little tiny bit smaller than this
8 one, a one-centimeter lesion. This is, like I said,
9 probably about 1.3 or 1.4, so it would be 10
10 millimeters as opposed to 13 or 14. A little tiny
11 bit smaller.

12 Q. Doctor, a one-centimeter nodule, would you
13 call that a microscopic nodule?

14 A. No. Microscopic means that you can -- at
15 least my definition of microscopic, microscopic
16 means that you really can only see with a
17 microscope. You wouldn't have seen it any other way
18 other than with a microscope.

19 Q. Is a one-centimeter nodule, depending on its
20 location, usually detectable on a CT scan?

21 A. The one centimeter?

22 Q. Yes.

23 A. Yes, sir.

24 Q. And if you did a CT scan and it didn't pick
25 up a one-centimeter nodule in the lung, is that what
26 you would call a false negative?

27 A. That's a false negative. If it were there
28 and you didn't see it, then that's a false negative.
29 Q. Let's go back to this hypothetical patient
30 who we know now would have a 1.2 centimeter lung
31 cancer in the lobe and would also have a one
32 centimeter tumor in the same lobe.

18103

1 Given that information, if there was no more
2 tumors, no more involvement anywhere, what stage
3 would that patient be in terms of cancer staging?
4 A. So there are two tumors in the same lobe? Is
5 that the question?
6 Q. Yes, sir.
7 A. Based on our current way we classify these
8 things, Stage 1 through 4, that would be a Stage 3,
9 about a Stage 3.
10 Q. Would that be a 3A or 3B?
11 A. A 3B.
12 Q. 3B, is that --
13 A. The staging -- there is a variety of things
14 in all these stagings. It's very complicated. But
15 it's a 3B.
16 Q. And a 3B, is that considered an early stage
17 cancer?
18 A. No. It's a later stage cancer.
19 Q. Well, there have been studies on population
20 groups concerning times of survival of patients with
21 different stages of tumors; correct?
22 A. Yes.
23 Q. And on the basis of a population group, what
24 is the five-year survival rate for people who have a
25 Stage 3B lung cancer?
26 A. My best guess on that would be somewhere
27 around between 8 to 10 percent.
28 Q. Okay. Thank you.
29 Now, Doctor, all of these beads on this
30 string, they could all turn out to be a Stage 1
31 cancer; correct?
32 A. Yes.

18104

1 Q. And if they were all a Stage 1 cancer, in
2 terms of treatment or survival, would it matter how
3 big the tumor was?
4 A. No.
5 Q. Assuming it was the size of one of those on
6 that string?
7 A. No. These could all be -- these T1 lesions
8 could all be Stage 1 disease absolutely.
9 Q. And in that sense, then, it wouldn't matter
10 if the cancer was the biggest on the bead?
11 A. This large one.
12 Q. Or the smallest on the bead?
13 A. That's correct.
14 Q. They would all be the same stage?
15 A. That is correct.
16 Q. So in that sense, smaller would not mean
17 better, would it?
18 A. No. It would mean the same stage on this.
19 Q. Okay. Now, have there been studies that have
20 looked at the various sizes of lung tumors to
21 determine whether they behave differently?
22 A. Yes.
23 Q. Are you familiar with some work done at Duke

24 University on that issue?
25 A. Yes.
26 MR. LONG:
27 Can we call up AN-002185, please?
28 BY MR. LONG:
29 Q. Is that the paper you are referring to?
30 A. Yes.
31 MR. LONG:
32 Your Honor, I think this has been
18105
1 previously admitted.
2 THE COURT:
3 Agreed?
4 MR. LEGER:
5 Yes.
6 THE COURT:
7 It's in evidence.
8 MR. LONG:
9 May I publish?
10 THE COURT:
11 Yes.
12 MR. LONG:
13 Ted, if we could blow up the sentence
14 starting right before Editorial Comment
15 and then ending after that?
16 BY MR. LONG:
17 Q. Dr. Spagnolo, does this sentence pretty much
18 capture what the study is all about?
19 A. Yes, it does.
20 Q. And could you explain the basic substance of
21 the study to the jury, please?
22 A. Well, this was an attempt to look at size of
23 T1 lesions, like we demonstrated here, and to see if
24 these individual little sizes here in the Stage 1
25 made any difference in terms of how long somebody
26 might live.
27 Q. And did the authors of the study, the people
28 who did the study, compare the survival rates of
29 different people with cancer based upon the size of
30 their tumor?
31 A. That's right.
32 Q. But everybody in this study was a Stage 1A?
18106
1 A. These are patients in Stage 1A.
2 Q. Okay.
3 MR. LONG:
4 Ted -- Your Honor, could we publish
5 the next page of this?
6 THE COURT:
7 You may publish it.
8 MR. LONG:
9 Ted, if you could highlight Table 1
10 up at the top?
11 BY MR. LONG:
12 Q. Now, Doctor, is this a table that the authors
13 prepared that compares the number of deaths of the
14 patients in each group based upon the size of the
15 tumor?
16 A. Yes, it did.
17 Q. Now, to assist in explaining your testimony
18 to the jury, have you worked with us to prepare a
19 demonstrative which turns the number of deaths into
20 percentages for purposes of comparison?

21 A. I did.
22 MR. LONG:
23 And could we please call up DDA-1540?
24 BY MR. LONG:
25 Q. Is that the chart you worked with us to -- to
26 demonstrate your testimony, Doctor?
27 A. Yes.
28 Q. And what you have done here is the bottom
29 part, you have taken the numbers from that chart,
30 taken the number of deaths, and compared those to
31 the number of people in that group, and come up with
32 a percentage; correct?

18107

1 A. Correct.
2 Q. And I think there is also an illustration of
3 some lungs on here and tumor size; correct?
4 A. Yes.
5 Q. And the tumor size is not meant to be
6 proportional to the size of the lung; correct?
7 A. No. It's illustrative to just show you
8 different sizes up to three.
9 Q. And in terms of the size of the tumors that
10 are mentioned on this demonstrative, you can easily
11 refer to the beads so that the jury knows the size
12 we are talking about; correct?
13 A. That's correct.
14 MR. LONG:
15 Your Honor, could we publish?
16 MR. MICHAEL GERTLER:
17 Your Honor, we do object.
18 THE COURT:
19 Approach the bench.
20 (At sidebar:)
21 MR. MICHAEL GERTLER:
22 Your Honor, by his own admission,
23 this chart and this size is
24 disproportionate to the lung in such a way
25 that it encompasses a much larger portion
26 of the lung than the size would actually
27 fairly represent.
28 We think a chart should fairly
29 represent what it's intended to. The
30 Doctor said he could use the beads to
31 testify about size, and those are fair
32 representations of size.

18108

1 But what's on this chart is not a
2 fair representation at all of the tumor
3 size, Judge.
4 MR. LONG:
5 Your Honor, the witness has already
6 testified that they are not relative in
7 comparison, it's just to show the
8 different sizes. And he will quantify
9 that by the beads.
10 THE COURT:
11 I think the jury can remember the
12 size of an actual lung, and they have got
13 the beads in their hands. The objection
14 is overruled.
15 (In open court:)
16 MR. LONG:
17 May we publish, Your Honor?

18 THE COURT:
19 Yes. The objection is overruled.
20 You may publish.
21 BY MR. LONG:
22 Q. Dr. Spagnolo, is this the demonstrative that
23 was prepared to illustrate and assist you in your
24 testimony concerning the results of this study on
25 Stage 1 tumor sizes?
26 A. Yes.
27 Q. And again, you show up here one centimeter,
28 two centimeter, .5 centimeter and a three centimeter
29 tumor, but the relationship of the size of those
30 tumors to the lung there, it's not proportional, is
31 it?
32 A. No, not exactly because the lungs are bigger.

18109

1 Q. And it's not intended to be proportional.
2 A. No.
3 Q. It's illustrative.
4 Let's go to the chart below. Could you tell
5 the jury what the chart below means in relationship
6 to the size of the tumor and the percentage of
7 deaths? And if you could, when you discuss each
8 range, if you could point to the bead that is
9 closest to the range in the size of the tumor?
10 A. Okay. My beads got a little out of sequence
11 here so I have got to move them.
12 If we were to start at the bottom left -- I
13 don't have a pointer, but the one that says .5 cm,
14 that would be, I guess, for the jury, that would be
15 not the little teeny, teeny one, but the one next to
16 it. The sort of shiny one. That would be this one.

17 THE COURT:
18 There was a laser pointer here
19 earlier. I don't see it.

20 THE WITNESS:
21 Well, should I continue?

22 BY MR. LONG:
23 Q. You are referring to the top of the tumor
24 size chart, you are referring to that top, the
25 smallest on the left-hand side, the smallest, the
26 yellow dot at the top?
27 A. Yes, sir.
28 And I guess then if we wanted to go to the
29 next one, which would be the top left, 1.0
30 centimeters, the closest one we have here would
31 be -- well, it would be a little bit smaller than
32 this 1.3, 1.4 one I showed you, the third from the

18110

1 biggest.
2 And then if we move over to the right, the
3 closest one that I can show you here would be the
4 1.8. So the one on the top right where it says 2
5 would correspond to the next largest one here.
6 And then the bottom right and around I guess
7 5:00 coming down clockwise, where it says 3.0,
8 that's 30 millimeters, that's a little bit larger
9 than the largest one that you have here. This is
10 about 2.4, 2.5. So this is about 25 and that's 30,
11 or 3.0.
12 Q. And Doctor, on this chart at the bottom, the
13 smallest tumors, the percentage of deaths, do you
14 recall the time period? Was this a five-year?

15 A. Yes.
16 Q. And the people with the smallest tumors,
17 unfortunately 15 percent of those folks passed away
18 within five years?
19 A. That's right. The little teeny tiny one at
20 the top is, remember, the smallest tumor that we are
21 showing, and that had the same death rate, 15
22 percent.
23 Q. And if we go down to the largest tumor, what
24 was the rate of deaths in that group?
25 A. That was the same.
26 Q. So even though these were tumors of different
27 sizes, one that's very small on the little chain of
28 beads you have and one pretty large, the number of
29 deaths is about the same?
30 A. They were. They were virtually the same when
31 you look at the numbers.

32 And remember, some of these little tumors
18111
1 here, in the very teeny tiny one right here are
2 actually even smaller than this .5. Actually they
3 were -- somehow my littlest tiny bead, the really,
4 really, really, really tiny one, which I think got
5 hidden here somewhere, was about 2 to 3, and that
6 would be way down here at the very smallest tiny
7 one. And the tumors in this range here all had the
8 same death rate.

9 Q. So according to this study in terms of
10 survivability, size doesn't really matter; correct?

11 A. In this particular study.

12 Q. Okay.

13 MR. LONG:

14 Ted, could we take that down and go
15 back to the article, please, AN-2185?

16 And if we could publish page 1570?

17 THE COURT:

18 You may publish.

19 MR. LONG:

20 Your Honor, may I approach with a
21 hard copy of the study for the Doctor?

22 THE COURT:

23 Yes.

24 MR. LONG:

25 Thank you.

26 MR. LONG:

27 And Ted, if you could on the right-
28 hand side, the full paragraph on the
29 right-hand column, the full paragraph in
30 the middle, if you could highlight that
31 and blow it up?

32 No, the first full paragraph

18112

1 beginning with "Clinical studies have
2 shown." And I don't need the next
3 paragraph, just that paragraph right in
4 the middle.

5 BY MR. LONG:

6 Q. Okay. Now, Doctor, there is a lot of
7 information in here. I'm going to ask you if you
8 could go through this sentence by sentence and
9 explain the significance of these conclusions to the
10 jury, please.

11 A. Okay. It is a little complicated. Maybe it

12 would be better if, I guess, read each sentence one
13 at a time.

14 Q. That's fine.

15 A. Clinical studies have shown that metastases
16 can be seen in tumors of any size.

17 And what that says is that a little teeny
18 tiny thing this big, the littlest one you have on
19 your chain, can metastasize at any time. It can
20 metastasize when it's that big, or it may
21 metastasize when it's only as big as the biggest one
22 on your list.

23 The preliminary CT screening trials
24 themselves determined that up to 30 percent of small
25 primary cancers metastasized to the lymph nodes or
26 distant sites on initial examination.

27 They are saying here that the early data from
28 the CT screening trials have already shown that 30
29 percent of the time these small little tiny nodules
30 have already spread to those glands that I
31 mentioned, the lymph nodes that are deep in your
32 chest or elsewhere, or to distant sites like perhaps

18113

1 the liver or the brain or the adrenal gland or
2 something like that.

3 In addition, tumor cells can be found in the
4 peripheral blood and bone marrow of patients with
5 all stages of disease.

6 This means that if you look for tumor cells
7 in those areas, you find them already.

8 More recent experimental studies supporting
9 these data suggested that tumors co-opt normal
10 vessels.

11 And what I believe they mean by that is they
12 invade the normal vessels, they get into the normal
13 vessels in some way so they can get into the
14 bloodstream.

15 And metastatic disease occurs even when
16 lesions are less than one millimeter.

17 And less than one millimeter is even smaller
18 than the tiniest, teeniest one that you have got on
19 your little thing, your little chain.

20 Q. Doctor, if I could interrupt you for one
21 second.

22 Metastatic disease, that's a cancer that
23 spreads from some other site?

24 A. Metastatic disease when we are talking about
25 staging, that means it's gone from the lung to
26 somewhere else in the body.

27 Q. But cancer also can start somewhere else in
28 the body and metastasize to the lung?

29 A. That's correct.

30 Q. And that would not be a primary lung tumor;
31 correct?

32 A. That's called a metastatic lung tumor to the
18114

1 lung. You can have a tumor in the kidney that can
2 go to the lung, that's right.

3 Q. Okay. Thank you. Can you go back to the
4 exhibit, please?

5 A. In fact -- and I think we are right about
6 here, if I can pick up again.

7 In fact, by the time a lesion -- these are
8 also called lesions as opposed to solitary

9 nodules -- has grown to 5 millimeters, close to the
10 limits of nodule detection by CT, the cancer is late
11 in the biology of the disease. Host death typically
12 occurs at 10 to the 12th tumor cells.

13 The exact time at which metastases or genetic
14 changes result in an aggressive malignant phenotype
15 is not well established.

16 What that means is the exact time at which
17 the cancer cells in this little tiny thing go in and
18 metastasize versus the time at which a big one go
19 and metastasize is not well worked out. But we know
20 that the little teeny tiny ones frequently have
21 already metastasized. So they can metastasize very,
22 very early.

23 All of these findings -- and we are down here
24 at the bottom, right down here.

25 All of these findings suggest that small
26 nodule detection by imaging studies does not
27 necessarily correspond to the biological behavior of
28 the tumor.

29 In other words, how each individual tumor is
30 going to behave is not necessarily dependent on
31 size.

32 I think that is the end.

18115

1 Q. Doctor, now, based upon your clinical
2 experience and teaching, do you agree with the
3 conclusions?

4 A. I do.

5 Q. And do conclusions such as these, could those
6 be one of the reasons why finding smaller tumors,
7 whether it's by CT or an x-ray, hasn't shown to
8 decrease deaths from lung cancer?

9 A. That's right.

10 Q. It talks about a five millimeter -- that's a
11 one half centimeter tumor in this section. How many
12 cancer cells are in a five millimeter tumor?

13 A. Probably, oh, I would say probably a hundred
14 million.

15 Q. And can those cancer cells get into the
16 bloodstream in a tumor even that small?

17 A. They could probably -- if the tumor is
18 programmed to metastasize, and that's based on the
19 gene of the tumor, yes, it could metastasize, that
20 size or even smaller.

21 Q. So is it your belief that it's the gene of
22 the tumor more so than the size that determines how
23 early it may metastasize or spread?

24 A. Correct.

25 Q. And what is your basic opinion about the
26 relationship between tumor size and tumor behavior?

27 A. Well, small tumors can metastasize and large
28 tumors can metastasize. And as long as we are not
29 talking about the same stage here, the survival is
30 the same.

31 Q. And in terms of that opinion, what is your --
32 strike that.

18116

1 What are the implications of your views that
2 tumor size doesn't matter in terms of metastasis on
3 screening by CT scans for lung cancer?

4 A. It's probably not going to change overall
5 mortality from the disease.

6 Q. Let's move on to another area. I'm trying to
7 wrap up here.

8 Do you still have your copy of the supplement
9 to Chest Magazine or the Chest Journal we talked
10 about yesterday? That's the one that has the
11 guidelines on it, the guidelines for diagnosis and
12 treatment of lung cancer.

13 MR. LONG:

14 Could we pull up LR-2268, please?

15 Your Honor, I believe this has
16 previously been admitted.

17 THE COURT:

18 Agreed?

19 MR. MICHAEL GERTLER:

20 Agreed, Your Honor.

21 MR. LONG:

22 Could we publish, please?

23 THE COURT:

24 You may publish it.

25 MR. LONG:

26 And Ted, could you on the left-hand
27 column blow up the paragraph in the
28 middle, please? I think this is big
29 enough for all of us to read.

30 BY MR. LONG:

31 Q. But in the first sentence here, Doctor, they
32 indicate that what they have done in putting
18117

1 together these guidelines is review evidence that's
2 out there on CTs and looking for lung cancer;
3 correct?

4 A. Yes.

5 Q. They have done an evidence review?

6 A. They have looked at all of the available
7 studies.

8 Q. And then they also point out that the
9 recommendations they make, their guidelines, are
10 consistent with other organizations that looked at
11 the same issue; correct?

12 A. Yes.

13 Q. And there is another article in this same
14 special issue of the journal that discusses the
15 evidence, the studies they reviewed --

16 A. Yes.

17 Q. -- in reaching their guidelines; correct?

18 A. Yes. They reviewed a lot of studies.

19 MR. LONG:

20 Ted, could we go to LR-2269?

21 BY MR. LONG:

22 Q. And is this article the one that discusses
23 the evidence review --

24 A. Yes.

25 Q. -- that they did?

26 MR. LONG:

27 Your Honor, I think this has been
28 previously admitted.

29 MR. MICHAEL GERTLER:

30 No objection.

31 MR. LONG:

32 Could we publish, please?
18118

1 THE COURT:

2 You may publish it.

3 BY MR. LONG:
4 Q. And you see the title is Screening for Lung
5 Cancer. This is a review of the current literature;
6 correct?
7 A. Yes.
8 Q. And is there a chart in here that lists the
9 various studies that these people looked at?
10 A. Yes.
11 Q. Is it on page 75 -- no, it is not.
12 On page 77, that lists all of the low-dose CT
13 scan screening studies they reviewed?
14 A. Yes, it does.
15 Q. And that's what we are talking about here in
16 screening is the low-dose CT scan?
17 A. Correct.
18 MR. LONG:
19 May we publish page 77, Your Honor?
20 THE COURT:
21 You may publish it.
22 MR. LONG:
23 And Ted, could you just highlight
24 where it says Study Sites, the left-hand
25 column, and blow that up?
26 BY MR. LONG:
27 Q. And this is a list of the locations where the
28 various low-dose CT screening studies were done that
29 this committee reviewed; correct?
30 A. Yes. The studies were done in each of those
31 various areas.
32 Q. Now, the second one, the Cornell University
18119
1 studies, do you know who was involved in doing those
2 studies?
3 A. Yes. I have seen those studies.
4 Q. And who is the named principal investigator
5 on those studies?
6 A. Dr. Henschke was most of the time the lead
7 investigator.
8 Q. So these are the Henschke studies that we
9 have heard about in this case before?
10 A. I believe so.
11 Q. And have you reviewed -- well, strike that.
12 So the people who came up with these
13 guidelines, they had the Henschke studies in those
14 articles to review in reaching their guidelines;
15 correct?
16 A. Yes, that's what this means.
17 Q. And Doctor, before you reached your opinions
18 in this case, were you aware of and familiar with
19 the articles on the Henschke studies?
20 A. Yes.
21 Q. And you took those into account?
22 A. Yes.
23 Q. Okay. If we could move to --
24 MR. LONG:
25 No, keep that up, Ted, I'm sorry.
26 BY MR. LONG:
27 Q. And the next one after that is the Mayo
28 Clinic study?
29 A. Yes.
30 Q. And that's the one that we spent some time
31 discussing yesterday?
32 A. Yesterday we talked about that.

1 Q. And then if you look at those last three,
2 those are done in Japan?
3 A. Yes.
4 Q. And you are aware that certain CT screening
5 studies have been done in Japan?
6 A. Yes.
7 Q. And have you reviewed the articles?
8 A. I have.
9 Q. And did you take those into account and have
10 those in mind when you reached your opinions in this
11 case?
12 A. Yes.
13 Q. And the people who reached these guidelines
14 from the American College of Chest Physicians, they
15 had reviewed the data and the information on all of
16 these studies when they reached their guidelines;
17 correct?
18 A. Yes, they did.
19 MR. LONG:
20 Ted, if we could go back, please, to
21 LR-2268?
22 And publish, please?
23 THE COURT:
24 You may publish it.
25 MR. LONG:
26 Your Honor, I think I made a mistake
27 earlier when I said this has previously
28 been admitted.
29 Just for the record, I assume there
30 is no objection, but I would move the
31 admission.
32 MR. MICHAEL GERTLER:

1 I said no objection, that's why.
2 THE COURT:
3 Is that 2268 you are referring to?
4 MR. LONG:
5 Yes, Your Honor.
6 THE COURT:
7 If there is no objection, it will be
8 received.
9 MR. LONG:
10 And if we could publish page 87 of
11 this paper, please?
12 May we publish that?
13 THE COURT:
14 You may publish it.
15 MR. LONG:
16 And Ted, if you could highlight
17 Recommendation No. 3 there, please?
18 BY MR. LONG:
19 Q. And Doctor, is this the recommendation that
20 this group reached, the American College of Chest
21 Physicians and those working with them? Is this the
22 guideline they set forth for screening with low-dose
23 CT scans for lung cancer?
24 A. Yes.
25 Q. And they say: For individuals without
26 symptoms or a history of cancer, we recommend
27 against the use of a single low-dose CT or serial
28 low-dose CTs to screen for the presence of lung
29 cancer; correct?

30 A. That's what that says, yes.
31 Q. And do you agree with that?
32 A. Yes.

18122

1 Q. And then it goes on to say that people who
2 are at risk, who want to or are interested in
3 getting a low-dose CT screening, should be told
4 about these various ongoing clinical studies;
5 correct?
6 A. Correct.
7 Q. And they say the lack of evidence in
8 support -- and you would interpret the lack of
9 evidence being evidence in support of screening with
10 CT scans; correct?
11 A. Yes.
12 Q. -- is poor, and the benefit is none or
13 negative; correct?
14 A. That is correct.
15 MR. LONG:
16 Ted, we can take that down.
17 BY MR. LONG:
18 Q. And that again, those are the most recent
19 guidelines of any major public health organization
20 addressing screening for lung cancer with low-dose
21 CT scans; correct?
22 A. Right. These are the guidelines that --
23 after reviewing all of those studies, these were the
24 recommendations.
25 Q. And we have taken it down now, but you recall
26 they recommended against single or serial CT scans;
27 correct?
28 A. Yes.
29 Q. And serial CT scans would mean, for example,
30 CT scans every year; correct?
31 A. That is correct.
32 Q. Doctor, have you looked at various medical

18123

1 and public health organizations to determine their
2 positions on low-dose CT screening for smokers and
3 former smokers?
4 A. Yes.
5 Q. And have you helped us in preparing a
6 demonstrative that would illustrate and summarize
7 your testimony?
8 A. I did.
9 MR. LONG:
10 Could we pull up DDA-1546, please?
11 BY MR. LONG:
12 Q. It's on the screen in front of you, Doctor.
13 Is that the chart that lists the organizations that
14 you looked at?
15 A. Yes.
16 MR. LONG:
17 Your Honor, may we publish?
18 THE COURT:
19 Any objection?
20 MR. MICHAEL GERTLER:
21 No, no, Your Honor.
22 THE COURT:
23 You may publish.
24 BY MR. LONG:
25 Q. Dr. Spagnolo, has the Food -- United States
26 Food and Drug Administration, have they ever

27 approved the use of a CT scan to screen any part of
28 the body for its use?
29 A. No.
30 Q. So we can put a "No" in the box.
31 How about the National Cancer Institute? Has
32 the National Cancer Institute addressed the issue

18124

1 whether asymptomatic people should be screened with
2 CTs for lung cancer, have they addressed it?
3 A. Yes, they have addressed the issue.
4 Q. And what's their position?
5 A. It would go in the "No" column.
6 Q. And the American Cancer Society? Is the
7 American Cancer Society in favor or do they
8 recommend screening of asymptomatic smokers and
9 former smokers for lung cancer with CT scans?
10 A. They do not recommend it.
11 Q. Same issue, the American Lung Association,
12 what's their position?
13 A. They do not recommend it.
14 Q. That's a "No."
15 Same question, Society of Thoracic Radiology,
16 what do they say?
17 A. They say no.
18 Q. Same issue, American Academy of Family
19 Physicians, what do they say?
20 A. No.
21 Q. Same issue, American College of Chest
22 Physicians, what do they say?
23 A. No.
24 Q. Are you aware of any major public health
25 organization or medical group that recommends
26 screening of smokers and former smokers without
27 symptoms for lung cancer?
28 A. I am not aware of any.
29 MR. LONG:
30 We can take that down.

31 BY MR. LONG:

32 Q. Now, Doctor, we talked about medical

18125

1 organizations and groups, but even though it's not
2 the standard of care, don't some hospitals or
3 medical centers offer or even advertise the
4 availability of CT machines they have to screen for
5 diseases like lung cancer?
6 A. Yes, some do.
7 Q. And in fact, one of the hospitals that you
8 are familiar with, George Washington, don't they
9 offer lung screening?
10 A. Yes, they do.
11 Q. Now, does the fact that a hospital or medical
12 institution, whether it's in Louisiana or
13 Washington, D.C., or anywhere else, offers lung
14 cancer screening, does that make it the standard of
15 care?
16 A. No, it doesn't.
17 Q. And just because it is offered and some
18 people may want it, does that mean that the CT
19 screening is therefore medically necessary?
20 A. No.
21 Q. In your experience, are medical testing
22 procedures that are required by the standard of care
23 usually advertised?

24 A. Well, no. If it's the standard of care,
25 which means that's what we do, we do it for
26 everybody because it's the standard of care, you
27 probably don't need to advertise because we are
28 going to be doing it.
29 Q. And just because a medical procedure may be
30 advertised somewhere, does that mean that that
31 procedure becomes effective and has proven clinical
32 value?

18126

1 A. No.
2 MR. LONG:
3 Ted, if you could pull up DDA-1545,
4 please?
5 Your Honor, may we publish?
6 THE COURT:
7 Any objection?
8 MR. MICHAEL GERTLER:
9 No, Your Honor.
10 THE COURT:
11 With no objection, you may publish.

12 BY MR. LONG:

13 Q. Doctor, I'm sure the jury is very familiar
14 with these factors, but have you had a chance to
15 review these factors?

16 A. Yes, I have.

17 Q. And I'm not going to put it up on the screen
18 again, but have you had a chance to look at the
19 class definition in this case?

20 A. Yes.

21 Q. And do you have a general understanding of
22 who may be class members in this case?

23 A. Yes.

24 Q. Now, when you looked at the class definition,
25 did you see anything in the class definition that
26 said whether class members, just in the definition,
27 had to have symptoms of disease?

28 A. No.

29 Q. So based on the class definition, maybe you
30 could have symptoms and maybe you wouldn't have
31 symptoms; correct?

32 A. Yes, correct.

18127

1 Q. And in your clinical practice as a doctor,
2 would it be important to you if somebody had
3 symptoms or didn't have symptoms in terms of whether
4 you would order a particular test; correct?

5 A. Yes.

6 Q. Now, I want you to assume a couple of
7 things.

8 Assume that this definition went out in a
9 notice published for class members to see; okay?

10 A. Yes.

11 Q. I want you to assume that the notice
12 published in the newspapers said that plaintiffs
13 seek on behalf of the class the establishment of a
14 fund for medical monitoring and smoking cessation.

15 And I want you further to assume that this
16 notice that went to class members said the purpose
17 of medical monitoring is to detect latent disease or
18 injury; okay?

19 A. Yes.

20 Q. Now, as a physician, as a doctor, what does

21 latent disease, the term that I mentioned, what does
22 that mean to you?

23 A. Latent to me would mean something that is not
24 manifested, or concealed.

25 Q. And would you -- if the disease was latent,
26 could that be a disease that a person didn't know
27 about and had no symptoms?

28 A. That's what it would mean to me, yes.

29 Q. I just want to go through two or three of
30 these factors here.

31 MR. LONG:

32 Ted, could we just pull up the second
18128

1 one, please?

2 BY MR. LONG:

3 Q. Okay. Doctor, this one basically has an
4 issue of whether -- addresses the issue of
5 significantly increased risk of contracting a
6 serious latent disease.

7 Let's talk about lung cancer. Having read
8 the class definition, in your view, are all members
9 of the class at a significantly increased risk of
10 contracting lung cancer?

11 A. No.

12 Q. Okay. Let's go to the fifth factor, please.
13 And let's talk about the last one here, it says and
14 is reasonably necessary according to contemporary
15 scientific principles.

16 Dr. Spagnolo, in your opinion, is CT
17 screening for lung cancer in smokers and former
18 smokers reasonably necessary according to
19 contemporary scientific principles?

20 A. No.

21 Q. If we could pull up the last factor, please?
22 The last factor is there is some demonstrated
23 clinical value in the early detection and diagnosis
24 of the disease.

25 Now, the term in the middle, clinical value,
26 Doctor, does that have any particular meaning to you
27 as a practicing physician?

28 A. Yes.

29 Q. What does it mean?

30 A. Well, it means that it's going to improve the
31 patient's life, save lives.

32 Q. Now, as of today, with the state of science,
18129

1 the state of research on CT screening in smokers and
2 former smokers for lung cancer, is there some
3 demonstrated clinical value in screening smokers and
4 former smokers with CT scans for lung cancer?

5 A. There is not yet demonstrated, no.

6 MR. LONG:

7 Thank you very much, Doctor.

8 I tender the witness, Your Honor.

9 THE COURT:

10 We will take our midmorning recess
11 until 11:00 by the wall clock.

12 Leave the beads in the courtroom,
13 please.

14 SPECIAL MASTER GIANNA:

15 I'm not sure they heard you.

16 THE COURT:

17 Leave the beads in the courtroom,

18 please.
19 (In open court without a jury
20 present:)
21 THE COURT:
22 Let the record reflect the jury has
23 left the courtroom.
24 Anything for the record by plaintiffs
25 counsel?
26 MR. MICHAEL GERTLER:
27 Nothing, Your Honor.
28 THE COURT:
29 Defense counsel, anything for the
30 record?
31 MR. WITTMANN:
32 No, Your Honor.

18130

1 THE COURT:
2 We will recess until eleven by the
3 wall clock.
4 (A recess is taken at 10:44 a.m.)
5 -- -- --
6 (In open court with a jury present at
7 11:04 a.m.:)
8 THE COURT:
9 Please be seated.
10 Cross-examination, Mr. Gertler?
11 MR. MICHAEL GERTLER:
12 Yes, Your Honor.
13 Good morning, ladies and gentlemen.

14 -- -- --
15 CROSS-EXAMINATION

16 BY MR. MICHAEL GERTLER:
17 Q. Good morning, Dr. Spagnolo.
18 A. Good morning.
19 Q. Dr. Spagnolo, did you testify that at one
20 time, you were a member of the D.C. Lung
21 Association?
22 A. No, I was a member of the D.C. Thoracic
23 Society.
24 Q. You were never a member of the D.C. Lung
25 Association?
26 A. Well, the D.C. Thoracic Society, as I
27 understood it, is kind of part of the D.C. Lung
28 Association.
29 Q. Do you recall giving me your resume' along
30 with your expert report in this case?
31 A. Yes.

32 MR. MICHAEL GERTLER:

18131

1 Your Honor, may I approach the
2 witness?
3 THE COURT:
4 Yes.
5 BY MR. MICHAEL GERTLER:
6 Q. Doctor, this is a portion of the resume' that
7 is entitled Professional Society Positions, and I
8 ask you, sir, is this the portion of the resume'
9 that you gave to me in connection with your expert
10 report?
11 A. Yes, it is.
12 Q. Is there a reference to the D.C. Lung
13 Association in that resume'?
14 A. Yes, there is.

15 Q. Would you read it to the jury, please?
16 A. I was a member of the board of directors. I
17 had actually forgotten that. That was during the
18 period I was also president of the D.C. Thoracic
19 Society.
20 Q. Thank you, sir.
21 Is it not a fact, Dr. Spagnolo, that
22 according to this resume', you ceased becoming a
23 member of the D.C. Lung Association in 1985?
24 A. Yes. Occasionally I think I may have sent in
25 money for dues since then, but I frankly don't
26 remember which years I may have paid dues to the
27 Thoracic Society.
28 Q. So by 1985, you were no longer a member of
29 the D.C. Thoracic Society, and you were no longer a
30 member, an active member certainly with the D.C.
31 Lung Association?
32 A. I'm not an active member in the Lung
18132

1 Association at the moment.

2 I still go to the D.C. Thoracic Society
3 meetings when they do presentations.

4 Q. Well, Dr. Spagnolo, I would like to speak to
5 you about the time frame when you were an active
6 member of the D.C. Lung Association, and ask you to
7 reflect back on those days, Dr. Spagnolo, and tell
8 this jury if you recall testifying before a
9 legislative committee back in 1981 with regard to
10 the distribution of free samples of cigarettes by
11 cigarette companies.

12 Do you remember that testimony?

13 A. I vaguely. I don't really remember the
14 actual testimony. I remember doing it, but I don't
15 remember the testimony.

16 Q. Were you under oath when you gave that
17 testimony?

18 A. I don't recall.

19 Q. But you certainly went there to tell the
20 truth, didn't you, Doctor?

21 A. Yes, I was.

22 MR. MICHAEL GERTLER:

23 Now, I'm going to ask, Carl, if you
24 would put up Scott Exhibit 47.04 on the
25 monitor of counsel, the Court and the
26 witness, please.

27 BY MR. MICHAEL GERTLER:

28 Q. Do you see the first page of that exhibit,
29 Doctor?

30 THE COURT:

31 We don't have it on our monitors at
32 this point, Mr. Gertler.

18133

1 MR. MICHAEL GERTLER:

2 I'm sorry, Your Honor.

3 BY MR. MICHAEL GERTLER:

4 Q. Do you see the first page?

5 MR. MICHAEL GERTLER:

6 Your Honor, is it up there?

7 THE COURT:

8 Let me give him a hard copy. It may
9 be --

10 MR. LEGER:

11 Easier.

12 BY MR. MICHAEL GERTLER:
13 Q. Doctor, are you looking at the first page of
14 that testimony?
15 A. Yes, dated 1981.
16 Q. That's a transcript of your actual testimony
17 before that legislative committee, isn't it, Doctor?
18 A. Yes. I have never seen it before, but --
19 yes, it is.
20 Q. Well, that's interesting, Doctor. Because
21 don't you indicate that appearance in the resume'
22 that was given to me in connection with your expert
23 report?
24 A. I indicated, yes. But I'm not sure I have
25 ever seen this summary.
26 Q. It's a transcript.
27 A. Correct.
28 Q. Okay.

29 MR. MICHAEL GERTLER:
30 Your Honor, I would like to now
31 publish that transcript, if I might,
32 please?

18134

1 MR. LONG:
2 Objection, Your Honor. May we
3 approach?
4 THE COURT:
5 Yes.
6 Doctor, give me that document, please.
7 THE WITNESS:
8 This back?
9 (At sidebar:)

10 MR. LONG:
11 First of all, Your Honor, we had an
12 agreement to exchange any testimony they
13 were going to use for impeachment twenty-
14 four hours before the witness takes the
15 stand. This is the first I have seen of
16 this.
17 Secondly, I'm not sure if this is a
18 written statement or a transcript. It
19 looks to me like a written statement.
20 But at any rate, it's only admissible
21 for impeachment. It's the same as a
22 deposition. You can't have a witness and
23 just throw his deposition up on the
24 screen. It's not an admission of an
25 party.

26 He can use it to impeach him. He can
27 ask him questions. It's hearsay.

28 MR. MICHAEL GERTLER:
29 He included this in his CV --

30 MR. LONG:
31 So?

32 MR. BENCOMO:

18135

1 Excuse me, let him finish.

2 MR. MICHAEL GERTLER:

3 -- and his report as the basis for
4 what he's here to testify about. That's
5 where I got it from.

6 I see no reason -- he has identified
7 it, he has recalled being there, and he
8 has even indicated that that is a

9 transcript.
10 THE COURT:
11 There are rules about using it. You
12 don't just throw it up on the screen, like
13 Mr. Long said.
14 If you ask him a question and he
15 gives an inconsistent answer, then you can
16 use it.
17 MR. MICHAEL GERTLER:
18 I will be happy to do that, Judge.
19 THE COURT:
20 But just to throw it up is a problem.
21 MR. MICHAEL GERTLER:
22 Because he identified it and because
23 it was authentic --
24 THE COURT:
25 I understand. It's an issue of
26 relevance at this point.
27 MR. LONG:
28 And touches on numbers.
29 THE COURT:
30 Well, read what I have here.
31 MR. LONG:
32 We don't have that.

18136

1 THE COURT:
2 It was in my folder but I don't have
3 the highlight.
4 MR. LONG:
5 Could you give us a copy?
6 THE COURT:
7 The objection is overruled.
8 MR. LONG:
9 Your Honor?
10 The objection was sustained, they
11 can't put the document up.
12 MR. BENCOMO:
13 What did you say, Your Honor?
14 THE COURT:
15 I may have misspoken. If Long's
16 objection is to publishing at this point,
17 that is sustained.
18 (In open court:)
19 THE COURT:
20 Next question, Mr. Gertler?
21 MR. MICHAEL GERTLER:
22 Yes, Your Honor.

23 BY MR. MICHAEL GERTLER:
24 Q. Dr. Spagnolo, do you remember being at this
25 particular meeting at the legislative committee and
26 offering testimony with regard to cigarette sample
27 peddling? Do you remember that?
28 A. Yes, I vaguely remember it, sure.
29 Q. Okay. And Doctor, do you recall telling that
30 legislative committee that you recognize the
31 health -- that you recognize, you, Dr. Spagnolo,
32 recognize the health and addiction consequences of

18137

1 smoking?
2 A. Yes.
3 Q. And you remember telling that legislative
4 committee that tobacco lobbyists will tell you
5 smoking isn't harmful or addictive? Do you remember

6 saying that?

7 A. I don't remember saying it, but if that's
8 what I said, that's what I said. That's what I
9 believed.

10 Q. Well, do you deny now under oath having said
11 that?

12 A. No, no. I just said I didn't remember.

13 Q. Do you recall, Doctor, having told that
14 legislative committee, not a courtroom, a
15 legislative committee, that they, the cigarette
16 companies, claim cigarette sample peddling has
17 nothing to do with health, we know better. Do you
18 remember making that statement?

19 A. I remember saying it, yes. I said I was -- I
20 remember saying it, sure.

21 Q. Now, Doctor, isn't it a fact that at that
22 time, you were directing the departments of
23 pulmonary medicine at two of Washington City's major
24 hospitals?

25 A. Yes.

26 Q. And isn't it a fact, Doctor, that you told
27 that legislative committee that you see the human
28 misery caused by cigarette smoking on a regular
29 basis?

30 A. I said that, and yesterday I told you that I
31 was trying to get cigarettes from being sold in all
32 the hospitals in Washington.

18138

1 Q. Doctor, didn't you tell that legislative
2 committee that D.C. had the second highest pulmonary
3 cancer death rate for black males among the nation's
4 ten largest cities?

5 A. I believe at the time it did.

6 Q. What is it now, Doctor?

7 A. I'm not sure.

8 Q. Do you have any reason to believe that it's
9 lowered since then?

10 A. I don't know the answer. I haven't looked at
11 that number.

12 Q. Did you also tell that committee, Doctor,
13 that the high rates of emphysema, bronchitis,
14 chronic heart disease and oral cancer are related to
15 smoking?

16 A. Yes.

17 Q. And low birthweight leading to infant illness
18 and death is likewise related?

19 A. Yes.

20 Q. And over three hundred thousand people die
21 annually as a result of cigarette smoking. Did you
22 say that?

23 A. Yes.

24 Q. Now, Doctor, did you also say: I have
25 heard -- and I'm going to ask you if this was your
26 quote to that legislative committee: I have heard
27 over and over, quote, I wish I had never started
28 smoking.

29 Did you tell the legislative committee in
30 1981 you had heard over and over again people tell
31 you: I wish I had never started smoking?

32 A. Sure.

18139

1 Q. And did that come from your practice of
2 medicine in relation to your discussions with your

3 patients?
4 A. Yes.
5 Q. But did you go on to tell that legislative
6 committee, Doctor: But smokers become, quote-
7 unquote, hooked on cigarettes?
8 Was that your word, hooked?
9 A. I don't remember it now, but if it's there,
10 sure.
11 Q. Hooked, h-o-o-k-e-d, in quotes. Do you
12 remember giving that word?
13 A. You reminded me that I did, and I have no
14 problem. I certainly probably would have said that.
15 Q. Did you go on to say that the National
16 Institute on Drug Abuse calls cigarette tobacco an
17 addicting substance and urges policymakers to treat
18 it as such? Was that what you told the legislative
19 committee?
20 A. I'm sure I did.
21 Q. And then you went on to say: Is it right,
22 then, to have free packs of addicting substance
23 thrust in the face of pedestrians on a public
24 street?
25 Was that your question?
26 A. If it's there, it certainly was.
27 Q. And we don't allow it for alcohol and other
28 drugs. Isn't that what you told that legislative
29 committee?
30 A. Yes.
31 Q. Now, let's go on, Doctor, just two more
32 paragraphs.

18140

1 Did you say the cigarette industry pretends
2 it doesn't induce anyone to start smoking, only
3 persuades existing smokers to switch brands? Was
4 that your statement to the legislative committee?
5 A. That was my statement.
6 Q. What was the basis for your statement in 1981
7 that cigarette companies actually are inducing
8 people to start smoking as opposed to switching?
9 A. Well, I don't remember what my basis was at
10 that time. It was probably some of the material
11 that I may have read and some of the things we may
12 have discussed in our committees. But I can't
13 remember at the time what it was.
14 Q. You believed it, though, didn't you?
15 A. I sure did.
16 Q. But here is what you said, and let me repeat
17 it and see if you remember these exact words: The
18 cigarette industry pretends it doesn't induce anyone
19 to start smoking, only persuades existing smokers to
20 switch brands. Don't believe it.
21 You told that legislative committee don't
22 believe the cigarette companies, didn't you, sir?
23 A. I said what I said.
24 Q. And you went on to say: Tobacco and
25 advertising executives don't.
26 What advertising and cigarette company
27 executives were you talking about?
28 A. I don't recall.
29 Q. As you sit here today, you don't remember the
30 basis for that statement that you told truthfully to
31 the legislative committee?
32 A. I don't remember now what executives I might

1 have been talking about. That was twenty years
2 ago. I just don't recall.

3 Q. Do you retract or do you want to change what
4 you said to that legislative committee today before
5 this jury under oath?

6 A. No, I am not retracting anything.

7 Q. Are you aware, Dr. Spagnolo, that in 1994,
8 the chief executive officers of those cigarette
9 companies, almost fourteen years later, raised their
10 hand, took an oath and swore that cigarettes were
11 not addictive or harmful?

12 A. I remember that.

13 MR. LONG:

14 Objection.

15 BY MR. MICHAEL GERTLER:

16 Q. You remember that, don't you, Doctor?

17 MR. LONG:

18 Irrelevant.

19 THE COURT:

20 Overruled. Answer, if you are able

21 to.

22 THE WITNESS:

23 I thought I answered it.

24 THE COURT:

25 Answer it again.

26 A. I don't remember that. I mean, I don't
27 remember who they were. I remember the event.

28 Q. Yeah. You just testified you remember them
29 doing that, don't you?

30 A. I remember the event, yes.

31 Q. So you know that from 1981 when you made this
32 statement to the legislative committee, all the way

1 up to '94, these cigarette companies were denying
2 that their cigarettes were harmful or that their
3 cigarettes were addictive. You knew that?

4 A. I knew based on what I saw in the newspaper.

5 Q. And in your mind, that was a lie, wasn't it,
6 Dr. Spagnolo?

7 A. Well, I can't tell you what was going through
8 their head. I know what they said and I know what I
9 believe. So I don't know -- I can't tell you why
10 they said what they said.

11 Q. Well, didn't I just read that you told this
12 legislative committee, quote-unquote, don't believe
13 it?

14 A. I'm sure I said that.

15 Q. Well, what did you mean by that, Doctor?

16 A. My impression was that that may or may not
17 have been true. So I don't have any problem with
18 that. But I don't know why they said that.

19 Q. Well, we want to know why you said don't
20 believe it.

21 A. Probably because I didn't believe it.

22 Q. And you go on to tell that legislative
23 committee, sir, one ad official admitted that
24 cigarette advertisements' major goal was to get new
25 smokers. You told that committee that, didn't you,
26 sir?

27 A. I probably did.

28 Q. Now, which advertising executive were you
29 referring to when you told that legislative

30 committee that he admitted that the cigarette
31 companies' advertising's major goal was to get new
32 smokers?

18143

1 A. I don't remember. I have no recollection. I
2 can't remember that at all.

3 I mean, I'm here to testify about screening.
4 But I don't remember that at all.

5 Q. So you are here to testify about screening
6 and to tell the full truth, aren't you, Doctor?

7 A. Of course.

8 Q. About everything you are asked about; isn't
9 that true?

10 A. Yes, sir.

11 Q. And to bring out all the facts to the jury,
12 aren't you, Doctor?

13 A. Yes, sir.

14 Q. You are prepared to do that?

15 A. Yes, sir.

16 Q. Well, let's go forward then, Doctor.

17 And you say: And secret documents show a
18 leading cigarette company ordered an ad campaign to
19 entice young people to smoke.

20 What were you referring to then, Doctor?

21 A. Well, again, I don't remember the specifics
22 about that, and I don't remember which documents.
23 I'm not even sure I saw those documents. We may
24 have discussed those before I prepared this
25 testimony, but I have no recollection of those
26 documents.

27 Q. In other words, you would tell a legislative
28 committee a statement about documents that showed
29 that the cigarette companies entice young people to
30 smoke and you really hadn't seen those documents?

31 A. No, I didn't quite say that I didn't see
32 them. I may have seen them when we were talking

18144

1 about preparing the testimony. I just don't have
2 any recollection of that.

3 Q. Certainly, Doctor, is it fair to say that you
4 wouldn't have given this testimony to this
5 legislative committee had you not actually seen the
6 documents that convinced you that their goal was to
7 entice young people to smoke?

8 A. I may have seen summaries of those documents
9 or pieces of those documents. I don't recall myself
10 the whole documents.

11 Q. Well, let's go on, Doctor. Let's see if you
12 can recall any one fact about this testimony that
13 you gave.

14 Bill 4-336 is the only way we can guarantee
15 that our young people won't be swayed into smoking
16 by cigarette sample peddlers.

17 Do you remember saying that?

18 A. I don't remember saying it, but if it's here,
19 I said it.

20 Q. Well, it's right before you now. Do you need
21 that document to refresh your memory?

22 A. No, I have the document. You asked me if I
23 remember right now saying it, and I'm telling you I
24 don't actually remember it, but it's here.

25 Q. It's here.

26 A. I'm sure I did.

27 Q. Does that refresh your memory, Doctor?
28 A. Not really, but I'm doing the best I can to
29 refresh my memory.
30 Q. Now, Doctor, it goes on to say: A tobacco
31 industry code discourages giving samples to minors
32 or anyone looking under 21.

18145

1 What code are you referring to there, Doctor?
2 A. I don't remember. I don't remember at this
3 moment.
4 Q. Was this a secret code?
5 A. Frankly, I just don't remember.
6 Q. Well, Doctor, look at what's before you.
7 Does that help refresh your memory?
8 A. I don't remember the details of this. It was
9 twenty years ago, and I just can't remember. I'm
10 looking right now and trying to remember, and I
11 don't.
12 Q. But look what you say next, Doctor: But Lung
13 Association staff have seen it happen.
14 Saw it happen with their own eyes; right,
15 Doctor?
16 A. I'm sorry, I missed -- where are you
17 pointing?
18 Q. The next sentence, Doctor, in the second full
19 paragraph on the second page: But Lung Association
20 staff have seen it happen. Do you see that?
21 A. Yes.
22 Q. Now, how about that? Do you remember that?
23 A. There apparently were people on the Lung
24 Association staff who said they saw it happen.
25 Q. Apparently?
26 A. So I was just repeating what they said.
27 Q. So your own staff -- because you are the
28 president; right?
29 A. No, I wasn't president of the Lung
30 Association. I was president of the Thoracic
31 Society.
32 Q. The Thoracic.

18146

1 The staff of the Lung Association said they
2 saw cigarette companies giving young people
3 cigarettes, free samples, in violation of their own
4 code. Isn't that what this says?
5 A. That's what they said they saw.
6 Q. And they were targeting young people. And by
7 that, I mean young people under the age of 18,
8 Doctor; right?
9 A. I don't know if they were under 18, but they
10 were --
11 MR. LONG:
12 Objection. Speculation.
13 A. They claim they saw them giving them to young
14 people.
15 THE COURT:
16 Doctor, if you hear the word
17 "Objection," you should not answer until I
18 rule on the objection.
19 THE WITNESS:
20 I'm sorry, I didn't hear it, sir.
21 THE COURT:
22 There was an objection made. Do you
23 wish to approach the bench?

24 MR. LONG:
25 He answered already.
26 THE COURT:
27 Maybe if the person objecting would
28 stand.
29 MR. LONG:
30 I didn't want my legs to get tired.
31 THE WITNESS:
32 It's my hearing maybe. If they had a

18147

1 microphone, I could hear better. I don't
2 hear well.

3 THE COURT:
4 I understand. Put your arm up.

5 THE WITNESS:
6 Thank you.

7 THE COURT:
8 If Mr. Long does that, that means
9 objection.

10 THE WITNESS:
11 I didn't hear him, I'm sorry.

12 THE COURT:
13 Next question, Mr. Gertler.

14 MR. MICHAEL GERTLER:
15 Thank you, Your Honor.

16 Your Honor, I would like to go ahead
17 and publish the document on the premise
18 that the witness has used it to attempt to
19 refresh his memory in connection with his
20 testimony.

21 MR. LONG:
22 Objection. Approach?
23 (At sidebar:)

24 MR. LONG:
25 It's still inadmissible. He didn't
26 testify -- number one, he didn't deny
27 saying anything in it.

28 Number two, when he was asked if it
29 refreshed his recollection, he said no.
30 If it's in here, I said it. He didn't
31 testify that anything in there refreshed
32 his memory. He said, I still don't

18148

1 remember, but if it's in here, I don't
2 deny saying it.

3 THE COURT:
4 Response?

5 MR. MICHAEL GERTLER:
6 I believe, Your Honor, that if he has
7 the document and he denies the document
8 refreshing his memory, if he says, yes,
9 that's a transcript of what happened, but
10 I don't remember based on it, then I can
11 introduce the document as the best
12 evidence of what happened.

13 THE COURT:
14 What is the article number? Is it
15 under relevance? Mr. Gianna has my Code
16 of Evidence, I don't have another one.

17 SPECIAL MASTER GIANNA:
18 I'm looking for it.

19 MR. MICHAEL GERTLER:
20 I can go on and come back if you want

21 me to keep going?
22 THE COURT:
23 I will take the objection under
24 advisement. I will check what the Code of
25 Evidence says, and I will signal to you
26 when I am ready to rule. Okay.
27 MR. MICHAEL GERTLER:
28 That's good.
29 (In open court:)
30 THE COURT:
31 I will take that objection under
32 advisement.

18149

1 Next question, please, Mr. Gertler.
2 MR. MICHAEL GERTLER:
3 Thank you, Your Honor.
4 BY MR. MICHAEL GERTLER:
5 Q. You understand, Dr. Spagnolo, that we now
6 represent the class of people who were smoking in
7 1981, and that those people who were victims of the
8 cigarette companies' fraud and misconduct are the
9 people that we are attempting to get these programs
10 put in place for? Do you understand that?
11 MR. WITTMANN:
12 Objection, Your Honor. May I
13 approach?
14 THE COURT:
15 The objection is sustained. Don't
16 answer the question. The jury will
17 disregard the question.
18 Next question, please.
19 BY MR. MICHAEL GERTLER:
20 Q. Do you have any appreciation of who the class
21 of Louisiana people are that we represent? Do you
22 understand the class?
23 A. Yes, I do, I think, sure.
24 Q. Do you understand that the class is composed
25 of smokers and former smokers in the state of
26 Louisiana?
27 A. Yes.
28 Q. And you understand that the remedies we are
29 seeking for these people are based on the liability
30 of the cigarette companies?
31 MR. LONG:
32 Objection, Your Honor. Speculation.

18150

1 No foundation.
2 THE COURT:
3 Overruled. Answer the question, if
4 you are able to. Do you remember the
5 question?
6 THE WITNESS:
7 I would like it repeated.
8 THE COURT:
9 The question is: Do you understand
10 that the remedies that we are seeking for
11 these people are based on the liability of
12 the cigarette companies?
13 A. Well, I'm not sure I understand, and I'm not
14 a lawyer so I don't understand the term liability
15 here.
16 But as I read that, it means you are looking
17 to find latent disease in people who have smoked

18 prior to 1996. I'm here to talk about screening for
19 those people.

20 Q. So do you have any understanding as to
21 whether the screening that we are seeking is based
22 on the fault of the cigarette companies from the
23 1980s, the 1970s, the 1960s and the 1990s?

24 A. It may be, sure. It may be.

25 Q. It may be.

26 Do you understand, Doctor, that the fault
27 that we are basing this case on is primarily the
28 misconduct that you went to a legislative committee
29 in 1981 and told them about --

30 MR. WITTMANN:

31 Objection.

32 Q. -- under oath?

18151

1 MR. WITTMANN:

2 Objection, Your Honor.

3 THE COURT:

4 Sustained. The jury will disregard
5 the question. Don't answer the question.

6 Next question, please.

7 BY MR. MICHAEL GERTLER:

8 Q. Doctor, and if our class members started
9 smoking as children, according to you, they would
10 really be in trouble from the standpoint of damage
11 to their lungs; isn't that true?

12 A. It would depend on for how many years they
13 smoked.

14 Q. Doctor, for individuals who start smoking as
15 teens, their situation is different than adults,
16 isn't it?

17 A. Well, I used to believe that. I used --
18 there was a time when I really thought that maybe
19 teens and younger people were much more susceptible,
20 and for a while I used -- but when I have gone back
21 and researched that topic, I haven't been able to
22 find any really significant evidence to support my
23 previous opinion on that.

24 So I am not sure I was correct at that time.

25 Q. Well, Dr. Spagnolo, didn't you recently
26 testify under oath to that in another tobacco trial?

27 A. That's what I just alluded to. I said I used
28 to believe and I thought that there might have been
29 some evidence in the literature that young lungs,
30 when lungs are immature -- because, you know, our
31 lungs grow as we get older. They grow until we are
32 about 20 and then we all begin to lose lung

18152

1 function.

2 And I used to think -- and I'm not quite sure
3 where I got that opinion -- that maybe younger lungs
4 were maybe for susceptible.

5 So since I made that statement -- and I don't
6 remember exactly when I made that statement -- I
7 have gone back and tried to find some really good
8 medical science to support that. And I haven't been
9 able to find that.

10 So I was probably wrong in making that
11 statement.

12 Q. You mean -- let me see if I understand. You
13 went on a witness stand like you are now, you took
14 an oath to tell the truth, you had a jury just like

15 these good people sitting here, and you told them
16 something that you had no basis for whatsoever?
17 A. No, I didn't say that.
18 I said that my clinical opinion at that time
19 based on what I thought I might have read or
20 reviewed when I answered that question, I answered
21 it to the best of my knowledge.
22 Afterward I went back to look to see if I was
23 correct, and I was not able to find anything to
24 support that opinion.
25 So obviously my opinion may have been wrong
26 at the time.
27 Q. Okay.
28 A. That's all I'm telling you. As a good
29 scientist, I went back to see if what I thought was
30 right. And I was testifying what I thought was
31 true.

32 I went back and looked at the literature, and
18153

1 the literature didn't support what I had said.
2 That's all I'm saying.
3 Q. Let me see if I can understand. What you are
4 telling this jury is that as a good scientist, you
5 went to look to see if there was support in the
6 literature for what you had already told the jury
7 under oath; right?
8 A. But I thought what I was telling them was
9 true based upon my state of knowledge. So that's
10 what I thought was true.
11 Q. But you didn't do the research to determine
12 whether it was true before you told it to the jury?
13 A. Well, no one had asked me that question
14 before.
15 Q. Well, I'm asking it. Isn't that true? You
16 didn't do that, did you?
17 A. I didn't, because I thought what I was
18 telling them was true based on what I thought I
19 knew.

20 Q. I happen to have a transcript --
21 MR. MICHAEL GERTLER:
22 Your Honor, may I approach the
23 witness, please?
24 THE COURT:
25 Yes.
26 BY MR. MICHAEL GERTLER:
27 Q. -- of your sworn testimony, sir. Do you see
28 that?
29 A. Yes, sir.
30 THE COURT:
31 State for the record the date and the
32 proceeding number so opposing counsel can

18154
1 get it, counsel.
2 MR. MICHAEL GERTLER:
3 I'm sorry. May I see it?
4 Your Honor, this is -- okay, Your
5 Honor, we have a copy for the witness.
6 BY MR. MICHAEL GERTLER:
7 Q. This is a transcript from In Re: Tobacco
8 Litigation, Medical Monitoring Cases, Jury Trial,
9 Volume 18-B, October 29, 2001.
10 Am I correct, is that what's before you?
11 A. Yes, sir.

12 Q. Now, Doctor, that's only a little bit more
13 than a year ago, huh, that you testified to that
14 before a jury?
15 A. Yes, sir.
16 Q. And let's see if we can go over what you told
17 that jury, and then I have a question for you,
18 Doctor.

19 MR. WITTMANN:
20 Objection, Your Honor.
21 MR. LONG:
22 Objection, Your Honor. May we
23 approach?

24 THE COURT:
25 You may approach.
26 (At sidebar:)

27 MR. LONG:
28 I object to this. The only use he
29 can use for this deposition in this case
30 is for impeachment. The Doctor has not
31 denied saying anything that he said in
32 this transcript. He's just trying to read

18155

1 this transcript into the record.

2 MR. MICHAEL GERTLER:
3 We are going to rephrase the
4 question.

5 MR. LONG:
6 Can you rephrase it now so we can
7 argue it now?

8 MR. MICHAEL GERTLER:
9 Yes. I'm going to ask the Doctor if
10 he testified under oath to A, B, C. If he
11 says yes and he doesn't deny, there is no
12 reason I have to use that transcript.

13 MR. LONG:
14 I think he has already testified to
15 that.

16 THE COURT:
17 The objection is overruled at this
18 point.

19 (In open court:)

20 BY MR. MICHAEL GERTLER:

21 Q. Doctor, you testified under oath that lungs
22 aren't fully developed until the age of 22, 23 or
23 24, and that they therefore may be more susceptible
24 to damage from cigarette smoke?

25 A. I said that.

26 Q. Are you changing that statement that you made
27 under oath?

28 A. I thought I just said that. I said at that
29 time that is what I believed based on my knowledge.

30 I'm not a pediatric pulmonary doctor, and I
31 thought I had read some literature that said young
32 immature lungs might be more susceptible.

18156

1 Q. Now, Doctor, do you remember stating under
2 oath that if you start smoking at 15 or 16, you have
3 more time to cause damage to those small airways way
4 out at the deepest points of the lung?

5 A. I said that if you start smoking then and you
6 smoke for twenty years, you obviously will have more
7 time to cause damage.

8 Q. Now, do you want to change that testimony

9 too, Doctor?
10 A. No. I'm saying that if you smoke for twenty
11 years -- I don't know if you are more susceptible.
12 It's the length of time is what I was implying.
13 Q. No. What you said, didn't you, Doctor, is
14 that children 15 or 16 year old who start smoking
15 will have more damage to the small airways in their
16 lungs?
17 A. That is what I said.
18 Q. Do you want to change that?
19 THE COURT:
20 Just a minute. Let him finish his
21 answer.
22 Finish your answer, please.
23 MR. MICHAEL GERTLER:
24 Yes.
25 A. I said that. And what I'm trying to tell you
26 is that's what I believed at the time I said that.
27 I subsequently later on went back, looked at
28 the literature, tried to find some pediatric
29 literature that would support what I said, thinking
30 that I was correct at the time.
31 And it turns out I haven't been able to find
32 that data. So I obviously -- that was a

18157

1 misinterpretation.
2 Q. Now, Doctor --
3 A. I did it at the time, I thought I was right.
4 Q. Now, Doctor, didn't you tell that jury under
5 oath that if an individual starts earlier and has
6 less mature lungs because they are younger, then the
7 extent to which they are damaged will be greater
8 than an adult?
9 A. I said that.
10 Q. And didn't you say, Dr. Spagnolo, that the
11 earlier you smoked, the more likely you will have
12 damage?

13 MR. LONG:
14 Objection, Your Honor.
15 MR. WITTMANN:
16 Objection. That's repetitive.
17 MR. LONG:
18 May we approach?
19 THE COURT:
20 You wish to approach, Mr. Long?
21 MR. LONG:
22 Yes, Your Honor.
23 (At sidebar:)
24 MR. LONG:
25 I object to this method of attempted
26 impeachment and move to strike.
27 If you look at the transcript that
28 they are talking about, Mr. Gertler says,
29 Didn't you say if you started smoking at
30 15 or 16, you are going to do more
31 damage?

32 No, the question was you had more
1 time, which is what the Doctor was trying
2 to say.
3 And he just said, Didn't you testify
4 that if an individual starts sooner, blah,
5 blah, blah, didn't you say that?

18158

6 No, what he said, he said, It could
7 be. He's mischaracterizing this all over
8 the place.

9 THE COURT:

10 The objection is sustained.

11 Mr. Gertler, if you are going to try
12 to use it for impeachment, use the exact
13 words, question and answer, and I won't
14 get this objection again.

15 But I think that's what the rules
16 require.

17 MR. MICHAEL GERTLER:

18 I have not referred to the transcript
19 at all. I have asked him directly a
20 question, and he can say yes or no, Your
21 Honor.

22 And if he believes that that's
23 important on redirect, he can bring out
24 anything he wants.

25 MR. WITTMANN:

26 No, the question was, Didn't you say
27 under oath?

28 MR. LONG:

29 You testified under oath.

30 MR. MICHAEL GERTLER:

31 Yes, but I didn't refer to a
32 transcript.

18159

1 THE COURT:

2 Didn't you say the earlier you smoke,
3 the more damage there was?

4 MR. LONG:

5 It's all been in the context of his
6 testimony in this case.

7 MR. MICHAEL GERTLER:

8 There was a transcript. I never
9 presented him with the deposition
10 testimony.

11 MR. LONG:

12 Look at the last question. This is
13 not what he said his answer was.

14 MR. MICHAEL GERTLER:

15 I am finished with this, and I'm not
16 going to do it anymore.

17 But I don't think I'm wrong in the
18 way I posed my question. I just want you
19 to know that --

20 THE COURT:

21 It's a very technical issue and there
22 is a gray area here. I'm trying to be
23 conservative.

24 If you are going to try to use his
25 prior testimony, use the exact words.

26 MR. MICHAEL GERTLER:

27 I thought he said I can't present him
28 with the deposition until he --

29 THE COURT:

30 Yes. But if you are going to ask him
31 the question, say weren't you asked this
32 question and didn't you give this

18160

1 answer --

2 MR. MICHAEL GERTLER:

3 I understand.
4 THE COURT:
5 The objection is sustained.
6 (In open court:)
7 THE COURT:
8 The objection is sustained, Doctor.
9 Don't answer that last question.
10 Next question, please, Mr. Gertler.
11 MR. MICHAEL GERTLER:
12 Yes, Your Honor.
13 BY MR. MICHAEL GERTLER:
14 Q. Dr. Spagnolo, do you believe as you sit here
15 now under oath before this jury that the earlier you
16 start smoking, the worse it would be?
17 A. No, I don't believe that based on the
18 evidence that I can find now.
19 Q. Now, Dr. Spagnolo, you have referred to the
20 evidence. Tell this jury what evidence you found
21 that contradicts that statement?
22 A. I haven't been able to find any evidence that
23 says that that is true.
24 Q. So tell this jury what journals you have
25 looked at so that they will know what kind of
26 investigation you have done to determine whether
27 that's true or not?
28 A. Well, I did a reasonable search. I went back
29 and looked at some pediatric textbooks, I went on
30 the web site, I went to the library, looked at some
31 pulmonary, other pulmonary texts.
32 And I can't find a definitive reference that
18161
1 would indicate that.
2 Q. Well, Doctor, can you, as you sit here today,
3 tell this jury the name of one specific journal that
4 addressed the subject that you looked at for the
5 purpose of determining whether what you said was
6 true or not?
7 A. Well, I looked at Nelson's, I believe it was
8 Nelson's pediatric textbook, and I think I looked
9 through some of the Journals of Pediatrics, and then
10 I looked on the web site under the NIH to look for
11 pediatric lung problems. Those are the ones I
12 remember.
13 Q. That's what you remember, Doctor. Did you
14 include that in your expert report?
15 A. No, I don't believe so.
16 Q. Did you correct what you had said in your
17 expert report, sir?
18 MR. LONG:
19 Objection, Your Honor.
20 MR. MICHAEL GERTLER:
21 I will rephrase.
22 BY MR. MICHAEL GERTLER:
23 Q. Did you give your up-to-date opinion on any
24 of that in your expert report, your current thinking
25 on the damage caused from smoking in children?
26 MR. LONG:
27 Objection, Your Honor. May I
28 approach?
29 THE COURT:
30 You may approach.
31 (At sidebar:)
32 MR. LONG:

1 It's misleading. The question
2 assumes facts not in evidence because his
3 expert report doesn't address this issue.
4 THE COURT:
5 I understand that, but he's on cross
6 and you have a right to redirect.
7 The objection is overruled.
8 (In open court:)
9 THE COURT:
10 Answer the question, please, Doctor,
11 and I will read the question back to you:
12 Did you give your up-to-date opinion on
13 any of that in your expert report, your
14 current thinking on the damage caused from
15 smoking in children?
16 A. I don't believe it's in the report. I don't
17 remember when I filed that report, and I don't
18 believe it's in there.
19 Q. Just to confirm, Doctor, the date I have on
20 the report I received --
21 THE COURT:
22 I have one, Mr. Gertler, to save you
23 a walk.
24 MR. MICHAEL GERTLER:
25 Thank you, Judge.
26 BY MR. MICHAEL GERTLER:
27 Q. Would you confirm the date was July 5th,
28 2000?
29 A. Yes, that's July 5th, 2000.
30 Q. Now, Dr. Spagnolo, you are being paid by the
31 cigarette companies to come here and testify today,
32 aren't you?

1 A. Yes.
2 Q. And you were paid by the cigarette companies
3 to go testify in the other tobacco case, weren't you?
4 A. Yes.
5 Q. And that's not the first time that you have
6 been involved with the cigarette companies at
7 sponsored activities, is it, Dr. Spagnolo?
8 A. I don't understand the question.
9 Q. Well, the question is very simple. Before
10 you testified in this case and the prior tobacco
11 case for the cigarette companies, you had been
12 involved with the cigarette companies in making
13 appearances as a scientific witness before, hadn't
14 you, sir?
15 A. Well, I don't remember.
16 Q. You don't remember. Tell this jury,
17 Dr. Spagnolo, what is the Indoor Air Pollution
18 Advisory Group?
19 A. I am sorry, I don't remember that. I don't
20 know what that is. At least if I do, I don't
21 remember.
22 Q. The IAPAG, that doesn't ring any bells to
23 you, sir?
24 A. Not at this moment it doesn't.
25 Q. Well, it might if I have a document that
26 makes reference to that organization in your name,
27 wouldn't you agree, it might refresh your memory?
28 A. I would like to see the document.
29 Q. Yes, sir.

30 MR. MICHAEL GERTLER:
31 Carl, would you put on the Judge's
32 screen and counsel's screen Scott Exhibit
18164

1 92.04?

2 BY MR. MICHAEL GERTLER:

3 Q. Do you see that document, Dr. Spagnolo?

4 A. Yeah, I do.

5 Q. Do you see that that document has a reference
6 to IAPAG Scientists' Activities. Do you see that?

7 A. I do.

8 Q. Do you see your name on that document, sir?

9 A. Yes, I do. It's down at the bottom.

10 Q. Uh-huh.

11 MR. MICHAEL GERTLER:

12 Now, Your Honor, I would ask to
13 publish this document, please?

14 THE COURT:

15 Objection?

16 MR. LONG:

17 No objection.

18 THE COURT:

19 You may publish.

20 MR. MICHAEL GERTLER:

21 First of all, Carl, could you
22 highlight and enlarge to who and from whom
23 this document was sent?

24 BY MR. MICHAEL GERTLER:

25 Q. This is a memorandum from January 30th, 1987;
26 correct, Doctor?

27 A. Yes, it is.

28 Q. Do you know who Samuel D. Chilcote, Jr., is?

29 A. I don't remember.

30 Q. Well, let's see if I can help refresh your
31 memory, Doctor.

32 Mr. Chilcote testified in this case by way of
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1 deposition that was read to the jury.

2 MR. WITTMANN:

3 I'm going to object to counsel
4 testifying. He can ask the witness a
5 question.

6 May I approach?

7 THE COURT:

8 Yes, and I wish you would have
9 approached before you made your speech,
10 Mr. Wittmann.

11 MR. WITTMANN:

12 I apologize to the Court.

13 THE COURT:

14 But you may approach to argue your
15 objection.

16 (At sidebar:)

17 MR. WITTMANN:

18 I think it's improper for counsel to
19 start testifying about something that's
20 not within the witness' knowledge.

21 This is a question and answer process
22 we go through, and this is highly
23 improper.

24 THE COURT:

25 The preceding question was do you
26 know who Chilcote is, and he said no.

27 Now, there is evidence in this record as
28 to who Chilcote is, and I think
29 Mr. Gertler can ask him don't you know
30 that he at some point was whatever he was.

31 MR. WITTMANN:

32 He can ask him that. That's not what
18166

1 he said. He testified.

2 THE COURT:

3 That's not what he did.

4 MR. LONG:

5 Your Honor, I would lodge an
6 objection to further questioning on this
7 document. This is not Dr. Spagnolo. It's
8 Spagnala with an l-a in there.

9 THE COURT:

10 He said his name appeared on it.

11 Maybe he didn't read it.

12 MR. LONG:

13 I don't think that's his name.

14 THE COURT:

15 I understand that.

16 MR. LONG:

17 Ask him if he recalls doing this.

18 THE COURT:

19 Well, you are objecting because he
20 gave a wrong answer. I don't think that's
21 an appropriate objection.

22 MR. LONG:

23 I don't think that he's right.

24 THE COURT:

25 Objection overruled.

26 (In open court:)

27 THE COURT:

28 The objection to the last question is
29 sustained. Don't answer that question.

30 Next question, please, Mr. Gertler.

31 BY MR. MICHAEL GERTLER:

32 Q. Dr. Spagnolo --

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1 MR. RUSS HERMAN:

2 Excuse me, may I see you a second?

3 MR. MICHAEL GERTLER:

4 That's okay.

5 MR. RUSS HERMAN:

6 All right.

7 BY MR. MICHAEL GERTLER:

8 Q. Dr. Spagnolo, have you heard that Samuel D.
9 Chilcote, Jr., during this time frame, 1987, was the
10 president of the Tobacco Institute?

11 A. Did you ask me if I knew that? Could you
12 repeat that question?

13 MR. MICHAEL GERTLER:

14 I could reread it back or I can
15 repeat it.

16 THE COURT:

17 I will read it back to you:

18 Dr. Spagnolo, have you heard that
19 Samuel D. Chilcote, Jr., during this time
20 frame, 1987, was the president of the
21 Tobacco Institute?

22 A. No, I did not know that.

23 Q. If I were to suggest to you, sir, that Samuel

24 D. Chilcote, Jr., testified that he was president of
25 the Tobacco Institute beginning in 1981 and
26 continuing into the '90s, would you have any reason
27 to dispute that fact?
28 A. No, I would not.
29 Q. Now, look at to whom it's from, Bill
30 Kloepper. Can you tell us, Dr. Spagnolo, who Bill
31 Kloepper was and what his position was in January of
32 1987?

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1 A. I don't know and I don't remember.
2 Q. Well, Doctor, if I were to suggest to you
3 that Bill Kloepper was the vice president of public
4 relations for the Tobacco Institute during that
5 period of time, would you have any basis to dispute
6 that fact?
7 A. No, I would not.
8 Q. Doctor, do you know what the Tobacco
9 Institute is?
10 A. No, I don't know what it is. I heard of it.
11 I'm not sure it even exists. I don't know.
12 Q. Do you know what the Tobacco Institute was
13 doing in January of 1987?
14 A. No, sir, I do not.
15 Q. If I were to indicate to you, sir, that
16 Mr. Chilcote testified that the Tobacco Institute
17 was a lobbying organization --
18 MR. WITTMANN:
19 Objection, Your Honor.
20 THE COURT:
21 Approach the bench.
22 (At sidebar:)
23 MR. WITTMANN:
24 The witness has said he doesn't know
25 the author of the memo, the recipient of
26 the memo, he's not sure what the Tobacco
27 Institute really is. And now we have
28 counsel testifying to something allegedly
29 the Tobacco Institute did outside the
30 witness' knowledge, and I submit it's
31 improper cross-examination.
32 MR. MICHAEL GERTLER:

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1 I think it's a perfectly legitimate
2 question to say, once he denies it, do you
3 have any basis to dispute that fact. It's
4 done all the time. I don't see anything
5 wrong with the form of the question.
6 THE COURT:
7 I presume your question would finish
8 up -- let me see what you asked.
9 If I were to indicate to you that
10 Mr. Chilcote testified that the Tobacco
11 Institute was a lobbying organization --
12 MR. MICHAEL GERTLER:
13 -- for the cigarette companies, for
14 the cigarette industry.
15 THE COURT:
16 That would be the balance of the
17 question?
18 MR. MICHAEL GERTLER:
19 That would be it.
20 THE COURT:

21 The objection is overruled.
22 MR. LONG:
23 Your Honor, may I be heard just one
24 second?
25 He has indicated no knowledge, so
26 there is no foundation. It wouldn't be
27 any different if Mr. Gertler said: If I
28 told you that the Tobacco Institute killed
29 babies, can you deny that? Well, he can't
30 deny it because he has no knowledge.
31 MR. MICHAEL GERTLER:
32 Mr. Chilcote is on the memorandum
18170
1 with his name that we are now cross-
2 examining him on. It's not about dead
3 babies.
4 MR. LONG:
5 It's the same issue, he has no
6 knowledge, and Mr. Gertler can ask him
7 anything and say can you deny it.
8 THE COURT:
9 I understand. I'm going to overrule
10 the objection and allow the answer, and we
11 are going to recess for lunch at that
12 point.
13 (In open court:)
14 THE COURT:
15 The objection is overruled. The
16 question wasn't completely asked.
17 Mr. Gertler, ask the question,
18 please.
19 BY MR. MICHAEL GERTLER:
20 Q. Dr. Spagnolo, if I were to indicate to you
21 that Mr. Chilcote testified that the Tobacco
22 Institute was a lobbying arm for the tobacco
23 industry, the cigarette companies, would you have
24 any basis to dispute that fact?
25 A. No, I would not.
26 MR. MICHAEL GERTLER:
27 Your Honor, this is a good time to
28 break.
29 THE COURT:
30 We are going to recess for lunch at
31 this point until 1:30.
32 (In open court without a jury
18171
1 present:)
2 THE COURT:
3 Let the record reflect the jury has
4 left the courtroom.
5 Anything for the record by plaintiffs
6 counsel?
7 MR. MICHAEL GERTLER:
8 Nothing at this time.
9 MR. RUSS HERMAN:
10 There is one issue, Your Honor.
11 MR. MICHAEL GERTLER:
12 Oh, I'm sorry.
13 MR. RUSS HERMAN:
14 Your Honor, we understand that, and I
15 didn't want to make an issue, that there
16 is a witness in the courtroom. We are
17 going to ask for sequestration from here

18 on out of all defense witnesses.
19 THE COURT:
20 Who is the witness in the courtroom?
21 MR. GAY:
22 Dr. Clement Eiswirth. He's an expert
23 who will testify next.
24 THE COURT:
25 There will be no sequestration of
26 expert witnesses. He's allowed in the
27 courtroom.
28 Defense counsel, anything for the
29 record?
30 MR. GAY:
31 Just trying to -- nothing for me.
32 MR. LONG:

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1 Nothing.
2 THE COURT:
3 We will recess until 1:30.
4 (Whereupon, the hearing recesses at
5 12:00 noon.)
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1 REPORTER'S CERTIFICATE
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3 I, NICHOLAS A. MARRONE, CCR, Registered
4 Merit Reporter, do hereby certify that the foregoing
5 proceedings were reported by me in shorthand and
6 transcribed under my personal direction and
7 supervision, and is a true and correct transcript,
8 to the best of my ability and understanding.

9 That I am not of counsel, not related to
10 counsel or the parties hereto, and not in any way
11 interested in the outcome of this matter.
12

13
14 _____
NICHOLAS A. MARRONE (CCR 21011)

CERTIFIED COURT REPORTER
REGISTERED MERIT REPORTER

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